IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FRANCIS G. MARKS,
JOHN L. MARKS, JR.
PATRICIA J. MARKS,
ELIZABETH A. McCLURE
M. CHELSEY MARKS,
ANTHONY MARKS,
CATHERINE D. MARKS,
EAST ENDERS, L.L.C., and
JOSEPHINE LUTHER,

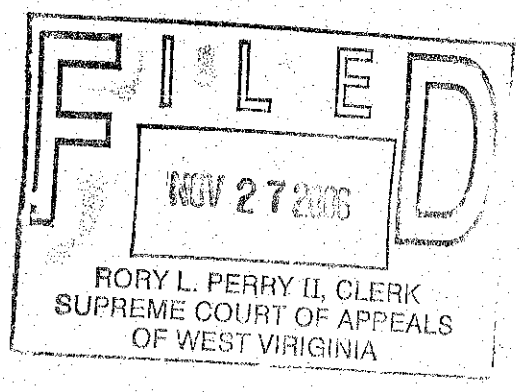
Appellants/Defendants Below

vs.

SCHRADER, BYRD & COMPANION, P.L.L.C.,

Appellee/Plaintiff Below,

Appeal No. 33184



APPELLEE'S BRIEF

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"Part of the [Garner Williams litigation] settlement included a new lease for Mary Catherine Marks and Defendant Josephine Luther....The amounts to be received under the new lease agreement were speculative and not conductive to a percentage calculation, as per the written contingency fee contract. Therefore, on March 30, 1998, Mary Catherine Marks and Defendant Josephine Luther agreed that the best way to calculate the amount due under the contingency fee contract was to forward the amount equal to the contingency fee percentage when the new speculative amounts were actually received."[1]

I. INTRODUCTION

The Appellee, Schrader, Byrd & Companion, P.L.L.C., [SB&C], files its brief in an appeal from an Order entered by the Honorable Martin J. Gaughan, Judge of the Circuit Court of Ohio County [Judge Gaughan], awarding SB&C summary judgment on its claim to enforce a written contingency fee contract. SB&C believes that summary judgment was proper for a number of reasons.

First, SB&C represented Mary Catherine Marks [Ms. Marks] and Appellant Josephine Luther [Ms. Luther] in only one matter--the Garner Williams litigation. Second, SB&C and Ms. Marks and Ms. Luther entered into only one attorney fee contract--the December 20, 1988, contingency fee contract–and SB&C and Ms. Marks and Ms. Luther never modified the contingency fee contract. Third, SB&C negotiated the new Lease and side letter agreement as part of the Garner Williams litigation and settlement. Fourth, SB&C attempted to collect, and did collect, thirty percent (30%) of increased future Lease and side letter agreement amounts under the December 20, 1988, contingency fee contract only. Fifth, SB&C's attorney fee under the December 20, 1988, contingency fee contract is reasonable and not "clearly excessive" and SB&C bore much risk in the Garner Williams litigation. And sixth, SB&C explained to Ms. Marks and Ms. Luther the manner in which it would collect its thirty

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1 Summary Judgement Order at 2-3.

percent (30%) of increased future Lease and side letter agreement amounts under the December 20, 1988, contingency fee contract and they agreed.

II. STATEMENT OF FACTS

The Marks Appellants (the heirs of Ms. Marks) forced SB&C to file this litigation because even though SB&C spent approximately 4,214.80 lawyer hours and 971.90 paralegal hours on issues related to the underlying litigation and obtained a very sizeable settlement which produced very reasonable average hourly rates of approximately $260.00/hour for SB&C lawyers and $100.00/hour for SB&C paralegals under the subject contingency fee contract, the Marks Appellants now contend–after they and/or their mother complied with the contract for almost fifteen years (five of which included making the fee payments they now dispute)–that the attorneys' fees under the contract are clearly excessive and that they are not obligated to make future attorney fee payments.

On December 20, 1988, and pursuant to a written contingency fee contract, ***Bates stamped documents 2-3***[2], Ms. Marks and Ms. Luther retained SB&C to prosecute a claim against their brothers and various coal mining defendants (Laxare and Cannelton) for loss of income and other damages sustained as a result of the wrongful mining of mineral property situate in Boone County, West Virginia (hereinafter "Garner Williams litigation"). Ms. Marks, Ms. Luther, and their two brothers each owned

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[2] Unless otherwise noted, the Bates stamped documents referred to in this Brief are attached to one or both of the following pleadings filed in the Circuit Court and made part of the appellate record:

(a) SCHRADER BYRD & COMPANION, P.L.L.C.'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT and NOTICE OF HEARING *FILED UNDER SEAL*; and

(b) SCHRADER BYRD & COMPANION, P.L.L.C.'S REPLY TO DEFENDANTS' MEMORANDUM IN OPPOSITION TO SB&C'S MOTION FOR SUMMARY JUDGMENT *FILED UNDER SEAL*.

an undivided one-fourth interest in the Boone County mineral property which they inherited from their father. The contingency fee contract provides that

> [i]n the event that a settlement is effected after the institution of an action or actions, but prior to trial or trials of said action or actions, then and in that event Client agrees to pay said attorneys 30% of the amount collected by any such settlement in each such action.

Bates stamped document 2.

Laxare and Cannelton mined the Boone County mineral property under a lease dated July 1, 1968, but SB&C successfully argued that such lease was invalid as to Ms. Marks and Ms. Luther.[3] Thereafter–and almost ten years after Ms. Marks and Ms. Luther retained SB&C to prosecute the Garner Williams litigation–the litigation settled on April 3, 1998 for $3.5 million[4] ***plus the execution of a new coal mining lease and side letter agreement beneficial to Ms. Marks and Ms. Luther***[5]. ***APPENDIX A***. Pursuant to the written contingency fee contract, SB&C received a $1,050,000 attorney fee (i.e. thirty percent (30%) of $3.5 million). ***Bates stamped documents 58-59***. SB&C also received a

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3 The two defendant brothers (and their families) of Ms. Marks and Ms. Luther are still bound by the lease dated July 1, 1968.

4 The Appellants state that SB&C, prior to settlement, attempted to persuade the defendants to accept a settlement of $750,000.00, which, of course, would have resulted in a lower fee. Appellants' brief at 2 and 13. That is incorrect. Prior to the final settlement, the settling defendants were adamant that they could only come up with $3 million in cash in a lump sum, which was not sufficient to conclude the matter. The settling defendants then offered an ***additional*** $750,000.00 payable over ten years, but tied it to the amount of coal processed at the preparation plant located on the subject property. ***Bates stamped document 126***. In addition, the settling defendants would only guarantee fifty percent of the $750,000.00 with the other 50% or $375,000.00 being at risk depending upon how much coal was processed at the preparation plant. Ms. Marks and Ms. Luther rejected that proposal and the settling defendants eventually came up with $3.5 million in cash.

5 *See e.g.* ***(1)*** a United States Bankruptcy Court order dated March 18, 1998, ***Bates stamped documents 159-171 (ATTACHED)***, ***(2)*** the settlement agreement between Ms. Marks and Ms. Luther and Cannelton, ***Bates stamped documents 175-187***, ***(3)*** the settlement agreement between Ms. Marks and Ms. Luther and Laxare, ***Bates stamped documents 188-214***, and ***(4)*** SB&C's letters to Ms. Marks and Ms. Luther drafted almost contemporaneously with the subject settlement dated January 23, 1998, ***Bates stamped documents 4-10***, and March 31, 1998, ***Bates stamped documents 11-15 (ATTACHED)***.

$58,409.56 attorney fee from a prior settlement. ***Bates stamped documents 58-59.***

Success was not a "slam dunk" and SB&C bore much risk under the contingency fee contract (see e.g. section E.). For example, during those ten years, SB&C spent approximately 4,062.45 lawyer hours and 920.35 paralegal hours on the Garner Williams litigation. ***Bates stamped documents 60-134.*** Such work included title work in Boone County and litigation in the Circuit Courts of Boone and Kanawha Counties, the United States Bankruptcy Court for the Southern District of West Virginia, and the West Virginia Supreme Court of Appeals (Nos. 971688 and 971689), including filing and answering written discovery, retaining and designating expert witnesses, taking and defending depositions, filing and responding to motions for summary judgment, attending hearings, responding to petitions for appeal, drafting and/or negotiating the Lease and side letter agreement, and drafting and revising various settlement agreements. ***Bates stamped documents 60-134.***

In summary, for the period ending April 3, 1998, SB&C spent approximately 4,062.45 lawyer hours and 920.35 paralegal hours on the Garner Williams litigation (including the Lease and side letter agreement) and received $1,108,409.60 in attorneys' fees. Those figures combine to produce average hourly rates of approximately $250.00/hour for lawyers and $100.00/hour for paralegals.

As discussed above, **SB&C negotiated the new Lease and side letter agreement[6] as part of the settlement and such Lease and side letter agreement were an integral part of the settlement**. There is no evidence in the record establishing that SB&C negotiated the new Lease and side letter agreement in any context other than as part of the Garner Williams litigation and settlement.

The increased amounts that Ms. Marks and Ms. Luther would collect under the Lease and side letter agreement were speculative and difficult--if not impossible--to ascertain and/or quantify and/or reduce to present value at the time of the settlement. Therefore, on March 30, 1998, Ms. Marks and Ms. Luther both agreed that the best way for SB&C to collect its attorney fee under the contingency fee contract with respect to such increased future Lease and side letter agreement amounts would be for it to collect thirty percent (30%) of increased future Lease and side letter agreement amounts[7] if and when Ms. Marks and Ms. Luther actually received such amounts (hereinafter "Understanding").

The existence of the Understanding is evidenced by the time entry of Ray A. Byrd of SB&C for March 30, 1998, which provides

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[6] The Lease contained at least two separate provisions especially beneficial to Ms. Marks and Ms. Luther. ***Bates stamped documents 11-15 (ATTACHED)***. First, the new Lease required a defendant to pay to Ms. Marks and Ms. Luther an increased guaranteed minimum royalty of $30,000.00/year from the previous $6,000.00/year–a $24,000.00/year increase. Second, the new Lease required a defendant to pay to Ms. Marks and Ms. Luther an increased royalty for any coal actually mined and removed from their property of one-half of $1.35 per ton or five percent (5%) of the gross selling price, whichever is higher, for coal removed by the deep mining method and one-half of $1.50 per ton or 6% of gross selling price for coal mined or removed by the strip or auger mining method. Previously, the defendant paid to Ms. Marks and Ms. Luther a flat royalty of 12.5 cents per ton. The side letter agreement was especially beneficial to Ms. Marks and Ms. Luther because it required an operator on the Boone County mineral property to pay to Ms. Marks and Ms. Luther an additional 3 cents per ton for each ton of coal transported over, under, or across their property.

[7] SB&C would collect thirty percent (30%) of the ***increased*** Lease and side letter agreement amounts (i.e. thirty percent (30%) of those amounts over and above those arguably due under the lease dated July 1, 1968) and not thirty percent (30%) of the entire Lease and side letter agreement amounts.

> Telephone conference with Bill Luther and Kitty Marks regarding contingent fee contract; preparation of a statement and attempting to get instructions for wire transfer of funds for the closing on Friday; all parties agree that the increases negotiated in connection with tonnage royalty, annual minimums, wheelage or processing fees cannot be projected with any accuracy and any fees due on those amounts will be paid on an annual basis as received; continued to work on documents and review of matters for closing on Friday.

Bates stamped document 133. In addition, the Understanding is evidenced by SB&C's March 31, 1998, letter to Ms. Marks and Ms. Luther outlining in detail, and confirming, the Understanding. ***Bates stamped documents 11-15 (ATTACHED)***.

With respect to the Lease and side letter agreement, it is important to note that SB&C is not a party to the Lease and side letter agreement and it has absolutely no ownership, leasehold, possessory, etc., interest whatsoever in the Boone County mineral property governed by the Lease and side letter agreement.[8] With respect to the contingency fee contract, it is important to note that SB&C would simply receive a percentage of increased future Lease and side letter agreement amounts, and if Ms. Marks and Ms. Luther received no increased future amounts, then SB&C received no attorney fee.[9]

From April, 1998, through September 15, 2004, Ms. Luther honored–and never objected to--the contingency fee contract and paid to SB&C thirty percent (30%) of the increased Lease and/or side letter agreement amounts actually received. ***Bates stamped documents 58-59***. Ms. Marks passed away on March 20, 2000 and was survived by seven children, Francis G. Marks, John L. Marks, Jr., Patricia J. Marks, Elizabeth A. McClure, M. Chelsey Marks, Anthony Marks, and Catherine D. Marks

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[8] Judge Gaughan found that "[SB&C] is not a party to the lease and has no ownership, leasehold, or possessory interest in the land governed by the agreement." Summary Judgement Order at 2.

[9] SB&C's thirty percent (30%) share of increased future Lease and side letter agreement amounts is the percentage Ms. Marks and Ms. Luther agreed to at the outset of the Garner Williams litigation in the contingency fee contract.

(hereinafter "Marks Appellants").[10] Ms. Marks and/or the Marks Appellants honored–and never objected to--the contingency fee contract and paid to SB&C thirty percent (30%) of the increased Lease and/or side letter agreement amounts actually received from April, 1998, through October 28, 2003. ***Bates stamped documents 58-59.***

From April, 1998, through September 15, 2004, Ms. Luther and/or Ms. Marks and/or the Marks Appellants paid to SB&C approximately $83,761.53 under the contingency fee contract (i.e. thirty percent (30%) of the increased Lease and/or side letter agreement amounts actually received during that period). ***Bates stamped documents 58-59.*** Since the Garner Williams litigation settled on April 3, 1998, SB&C has additionally spent an approximate 152.35 lawyer hours and 51.55 paralegal hours on issues related to the Garner Williams litigation (including the Lease and side letter agreement). ***Bates stamped documents 134-148.***

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10 The Marks Appellants are bound by the contingency fee contract because even though Ms. Marks passed away several years ago, they admitted in Paragraph 19 of their SEPARATE ANSWER that such contract did not require, and does not require, them to perform any personal services. As a general rule, most contracts remain in effect after the death of one of the contracting parties. *United States ex. rel. Wilhelm v. Chain*, 300 U.S. 31, 33-35 (1937). An exception to the general rule is when the contract requires a party to perform a "personal service." See e.g. *Kanawha Banking and Trust Company v. Gilbert*, 131 W. Va. 88, 46 S.E.2d 225 (1947). For example, the West Virginia Supreme Court of Appeals has held that

> [w]here the acts stipulated in an agreement require the exercise of special knowledge, genius, skill, taste, ability, experience, judgment, discretion, integrity or other personal qualification of one or both parties, the agreement is said to be of a personal nature. In contracts of this kind the death of one who was to perform a personal service dissolves the contract.

Syl. Pt. 1 of *Kelley v. Thompson Land Company*, 112 W. Va. 454, 164 S.E. 667 (1932). The payment of money is not a "personal service" under *Kelly*. *Kelly* at 458.

In total, SB&C has spent approximately 4,214.80 lawyer hours and 971.90 paralegal hours on issues related to the Garner Williams litigation (including the Lease and side letter agreement) and has received approximately $1,192,171.10 in attorneys' fees. Those figures combine to produce average hourly rates of approximately $260.00/hour for lawyers and $100.00/hour for paralegals.

Judge Gaughan found that such attorneys' fee are "not excessive" and that SB&C "has shown the reasonable and fairness of the contract for attorneys' fees."[11] In fact, Judge Gaughan found that "the average hourly rates calculated to be $260.00 per hour for lawyers and $100.00 per hour for paralegals [are not] excessive for the skill and labor required in this case."[12] Most important, Judge Gaughan found that "the instant case had a significant degree of risk. The chance that Plaintiff would not prevail was very real....Even after the settlement, the value of the recovery and the fee were uncertain because it was contingent on the price of coal, whether anyone would mine it, and the amount of usage that would take place."[13] Finally, Judge Gaughan found that there was not "a second, separate attorney fee contract, or in the alternative, a modification of the December 20, 1988 contingency fee contract."[14]

Upon careful review of the record before Judge Gaughan at the time of summary judgment, it is clear that many of the facts alleged in Appellants' brief have no support in the evidentiary record:

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11 Summary Judgement Order at 11.

12 Summary Judgement Order at 12.

13 Summary Judgement Order at 12.

14 Summary Judgement Order at 12-13.

"When that portion of the lawsuit was resolved and the amount of damages was settled upon, there remained the fact that the coal companies lacked a valid lease and other agreements with Ms. Marks and Ms. Luther, who owned a share of the property." Appellants' brief at 5.	There is no evidence in the record to support this statement of fact and the Petition makes no evidentiary reference to support this statement. The lease and other agreements were negotiated **as part of** the Garner Williams litigation as a single, global settlement.
"The income generated from these new agreements was not 'loss of income and other damages sustained by Client as a result of the wrongful mining and improper mining of mineral property,' but rather new income going forward. As a result, the services provided by the Law Firm in negotiating and drafting these agreements was not within the contingent fee agreement and the firm should have been separately compensated on an hourly basis for these services." Appellants' brief at 5.	There is no evidence in the record to support this statement of fact and the Petition makes no evidentiary reference to support this statement. The lease and other agreements were negotiated **as part of** the Garner Williams litigation and settlement so that the coal company Appellants could pay their damages over time rather than in one lump sum and face the draconian penalty of going out of business.
"In the instant case, the modification of the contingent fee agreement occurred after the settlement was reached and when there was no longer any risk of litigation." Appellants' brief at 8.	There is no evidence in the record to support this statement of fact and the Petition makes no evidentiary reference to support this statement. There was **no modification** of the contingent fee agreement. SB&C has collected all of it fees under the December 20, 1988, contingency fee contract.

III. DISCUSSION OF LAW

A. STANDARD OF REVIEW

The West Virginia Supreme Court of Appeals has held that "[a] circuit court's entry of summary judgment is reviewed de novo." Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). Moreover, the Court has held that "[t]his Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed de novo." Syl. Pt. 4, *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996).

Applying this standard of review, it is clear that SB&C was entitled to summary judgment as a matter of law because no genuine issue of fact exists with respect to (1) SB&C representing Ms. Marks and Ms. Luther in only one matter--the Garner Williams litigation, (2) SB&C and Ms. Marks and Ms. Luther entering into only one attorney fee contract--the December 20, 1988, contingency fee contract, (3) SB&C negotiating the new Lease and side letter agreement as part of the Garner Williams litigation and settlement, (4) SB&C attempting to collect, and collecting, thirty percent (30%) of increased future Lease and side letter agreement amounts under the December 20, 1988, contingency fee contract only, (5) SB&C's attorney fee under the December 20, 1988, contingency fee contract being reasonable and not "clearly excessive" and SB&C bearing much risk in the Garner Williams litigation, and (6) SB&C explaining to Ms. Marks and Ms. Luther the manner in which it would collect its thirty percent (30%) of increased future Lease and side letter agreement amounts under the December 20, 1988, contingency fee contract.

B. THE CIRCUIT COURT PROPERLY FOUND THAT SB&C REPRESENTED MS. MARKS AND MS. LUTHER IN ONLY ONE MATTER AND THAT SB&C NEGOTIATED THE NEW LEASE AND SIDE LETTER AGREEMENT AS PART OF THE SETTLEMENT IN THAT MATTER.

SB&C represented Ms. Marks and Ms. Luther in only one matter–the Garner Williams litigation. It cannot be reasonably disputed that SB&C negotiated the new Lease and side letter agreement as part of the same representation and same settlement as is evidenced by ***(1)*** a United States Bankruptcy Court order dated March 18, 1998, ***Bates stamped documents 159-171 (ATTACHED)***, ***(2)*** the settlement agreement between Ms. Marks and Ms. Luther and Cannelton, ***Bates stamped documents 175-187***, ***(3)*** the settlement agreement between Ms. Marks and Ms. Luther and Laxare, ***Bates stamped documents 188-214***, and ***(4)*** SB&C's letters to Ms. Marks and Ms. Luther drafted almost contemporaneously with

the subject settlement dated January 23, 1998, ***Bates stamped documents 4-10***, and March 31, 1998, ***Bates stamped documents 11-15 (ATTACHED)***.[15]

Accordingly, the Appellants are incorrect when they suggest that there was a second, new and separate legal representation where SB&C agreed to negotiate the new Lease and side letter agreement on behalf of Ms. Marks and Ms. Luther because SB&C negotiated the new Lease and side letter agreement as part of the Garner Williams litigation and settlement.[16]

C. THE CIRCUIT COURT PROPERLY FOUND THAT SB&C AND MS. MARKS AND MS. LUTHER ENTERED INTO ONLY A SINGLE CONTINGENCY FEE CONTRACT AND THAT THEY NEVER MODIFIED THE CONTINGENCY FEE CONTRACT.

SB&C and Ms. Marks and Ms. Luther entered into only one attorney fee contract–the December 20, 1988, contingency fee contract. ***Bates stamped documents 2-3.***[17] At the time of the subject

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15 The Appellants contend that "[t]he income generated from these new agreements was not 'loss of income and other damages sustained by Client as a result of the wrongful and improper mining of mineral property....'" Appellants' Brief at 5. However, the Appellants focus only on a single, isolated provision in the contingency fee contract. The contingency fee contract more fully provides that Ms. Marks and Ms. Luther retained SB&C "to prosecute a claim against...Laxare, Inc. and Cannelton Industries, Inc. and any other person...that may be liable for, or on account of, loss of income and other damages sustained by [Ms. Marks and Ms. Luther] as a result of the wrongful and improper mining of mineral property situate in Boone County.... [and that Ms. Marks and Ms. Luther] agree to pay [SB&C] 30% of the amount collected by any such settlement in each such action." ***Bates stamped document 2***. SB&C prosecuted a claim against Laxare and Cannelton for wrongful and improper mining and it negotiated the new Lease and side letter agreement as part of the settlement in that action. Thus, SB&C is entitled to 30% of the increased amounts collected under the new Lease and side letter agreement.

16 The Appellants state that "the lease was renegotiated in 2002." Appellants' Brief at 9. That is incorrect. Rather, the Lease was amended and such amendment has no impact on the manner in which SB&C is to collect its attorney fee under the December 20, 1988 contingency fee contract. Nevertheless, the Appellants had the burden to prove in the lower court, but did not, the manner in which the amended Lease impacts, if at all, the way SB&C is to collect its attorney fee under the December 20, 1988 contingency fee contract.

17 Judge Gaughan found that "[Appellants] are incorrect in their assertion that there was a second, separate attorney fee contract, or in the alternative, a modification of the December 20, 1988 contingency fee contract." Summary Judgement Order at 13.

settlement, the increased amounts that Ms. Marks and Ms. Luther would collect under the new Lease and side letter agreement were speculative and difficult--if not impossible--to ascertain and/or quantify and/or reduce to present value.[18] Therefore, on March 30, 1998, Ms. Marks and Ms. Luther both agreed that the best way for SB&C to collect its attorney fee ***under the contingency fee contract*** with respect to such increased future Lease and side letter agreement amounts[19] would be for it to collect thirty percent (30%) of increased future Lease and side letter agreement amounts when Ms. Marks and Ms. Luther actually received such amounts.[20] It cannot be reasonably disputed that SB&C attempted to collect, and did collect, thirty percent (30%) of increased future Lease and side letter agreement amounts under the December 20, 1988, contingency fee contract only.[21]

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18 Judge Gaughan found that "[t]he amounts to be received under the new lease agreement were speculative and not conductive to a percentage calculation, as per the written contingency fee contract." Summary Judgement Order at 2.

19 Judge Gaughan found that "[o]n March 30, 1998, Mary Catherine Marks and Defendant Josephine Luther agreed that the best way to calculate the amount due under the contingency fee contract was to forward the amount equal to the contingency fee percentage when the new speculative amounts were actually received." Summary Judgement Order at 2-3.

20 The existence of the Understanding is evidenced by the time entry of Ray A. Byrd of SB&C for March 30, 1998, which provides

> Telephone conference with Bill Luther and Kitty Marks regarding contingent fee contract; preparation of a statement and attempting to get instructions for wire transfer of funds for the closing on Friday; all parties agree that the increases negotiated in connection with tonnage royalty, annual minimums, wheelage or processing fees cannot be projected with any accuracy and any fees due on those amounts will be paid on an annual basis as received; continued to work on documents and review of matters for closing on Friday.

Bates stamped document 133. In addition, the Understanding is evidenced by SB&C's March 31, 1998, letter to Ms. Marks and Ms. Luther outlining in detail, and confirming, the Understanding. ***Bates stamped documents 11-15 (ATTACHED)***.

21 As a result, there is no need to address the Appellants' argument that the "modification" of the contingency fee contract violates the Statute of Frauds or that the alleged "modification" may have required certain disclosures at the time of the alleged "modification". But assuming *arguendo* that the Statute of Frauds may have application to the alleged "modification," the West Virginia Supreme Court of Appeals has held that "[a] party to an oral contract for the sale of land, to which the statute of frauds is applicable, may, by conduct on his part, be estopped in equity to assert the statute of frauds as a defense to such contract." Syl. Pt. 1 of *Ross v. Midelburg*, 129 W. Va. 851, 42 S.E.2d 185 (1947). From April, 1998, through September 15, 2004, Ms. Luther and/or Ms. Marks and/or the Marks Appellants paid to SB&C approximately

Accordingly, the Appellants are also incorrect when they suggest that there was a second, new and separate attorney fee contract (or a "modification" of the December 20, 1988, contingency fee contract) where SB&C agreed to negotiate the new Lease and side letter agreement on behalf of Ms. Marks and Ms. Luther for a percentage of lease payments because SB&C's receipt of thirty percent (30%) of the increased Lease and side letter agreement amounts is simply its attorney fee ***under the December 20, 1988, contingency fee contract only***.

D. THE CIRCUIT COURT PROPERLY FOUND THAT SB&C'S ATTORNEY FEE WAS REASONABLE AND NOT EXCESSIVE.

The West Virginia Supreme Court of Appeals has noted that "[c]ontracts for contingent fees, generally having a greater potential for overreaching of clients than a fixed-fee contract, are closely scrutinized by the courts where there is a question as to their reasonableness. This close scrutiny arises from the duty of the courts to guard against the collection of a clearly excessive fee [22], thereby fulfilling the primary purpose of attorney-disciplinary proceedings, specifically, protecting the public and maintaining the integrity of the legal profession." *Committee on Legal Ethics v. Tatterson*, 177 W. Va.

$83,761.53 under the contingency fee contract as thirty percent (30%) of the increased Lease and/or side letter agreement amounts actually received during that period (most in the form of signed checks). ***Bates stamped documents 58-59***. The amounts contained in the signed checks can be ascertained or made certain by other documents reflecting the Understanding. See e.g. Syl. Pt. 1 of *Fry Racing Enterprises, Inc. v. Chapman*, 201 W.Va. 391, 497 S.E.2d 541 (1997)(Holding that "[e]very agreement required by the statute of frauds to be in writing must be certain in itself or capable of being made so by reference to something else, whereby the terms can be ascertained with reasonable certainty.") Moreover, Appellant Tony Marks also signed documents reflecting the Understanding. ***Bates stamped documents 32 and 35 (produced in discovery)***. See e.g. *Timberline v. Heflin*, 180 W.Va. 644, 648, 379 S.E.2d 149 (1989)(Seemingly agreeing that the purpose of the Statute of Frauds "is to prevent the fraudulent enforcement of unmade contracts, not the legitimate enforcement of contracts that were in fact made.")(citing 2 A. Corbin, *Corbin on Contracts* §498 (1950 & 1984 Supp.))

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With respect to whether or not a contingency fee is clearly excessive, the Court has held that "[i]n the absence of any real risk, an attorney's purportedly contingent fee which is grossly disproportionate to the amount of work required is a 'clearly excessive fee' within the meaning of [Rule 1.5(a) of the Rules of Professional Conduct]." Syl. Pt. 3 of *Committee on Legal Ethics v. Tatterson*, 177 W. Va. 356, 352 S.E.2d 107 (1986)(Emphasis added). The Court has stated that "a contingent fee is clearly excessive if the skill and labor required of the lawyer are grossly disproportionate to the fee." *Committee on Legal Ethics v. Gallaher*, 180 W. Va. 332, 335, 376 S.E.2d 346, 349 (1988) (citations omitted).

356, 363, 352 S.E.2d 107, 114 (1986)(emphasis added). Nevertheless, the Court has made clear that it "is loathe to deny an attorney compensation for services performed." *May v. Seibert*, 164 W. Va. 673, 680, 264 S.E.2d 643, 647 (1980)(quoting *Suffolk v. Roadways, Inc. v. Minuse*, 287 N.Y.S.2d 965 (1968)).

The Appellants and their proffered expert witness argue that "the fee collected so far on the lease is grossly disproportionate to the work performed and that the disproportionality will increase as time goes on and more fees are taken." But the Appellants and their proffered expert witness only consider the fees received (i.e. $83,761.53) and the hours expended (i.e. an approximate 152.35 lawyer hours and 51.55 paralegal hours)[23] ***since the date of the subject settlement***, and they do so, because they are working ***under the incorrect conclusion*** that there was a second, new and separate legal representation where SB&C agreed to negotiate the new Lease and side letter agreement on behalf of Ms. Marks and Ms. Luther.

But when you ***correctly*** consider the facts (a) that SB&C negotiated the new Lease and side letter agreement as part of the Garner Williams litigation and settlement and (b) that SB&C has spent a grand total of approximately 4,214.80 lawyer hours and 971.90 paralegal hours on issues related to the Garner Williams litigation (including the new Lease and side letter agreement) between 1988 to the present and received approximately $1,192,171.10 in attorneys' fees, then SB&C's attorney fee is reasonable and not clearly excessive. Those figures combine to produce average hourly rates of

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[23] These figures combine to produce average hourly rates of approximately $500.00/hour for lawyers and $100.00/hour for paralegals. Even under the Appellants' approach, those figures are not clearly excessive as a matter of law.

approximately $260.00/hour for lawyers and $100.00/hour for paralegals.[24] Such hourly rates are not "clearly excessive" as a matter of law.[25] In fact, the United States District Court for the Southern District of West Virginia recently awarded a contingency fee producing an average hourly rate of $1,470.09/hr. *See Abramson v. Laneko Engineering Company*, Civil Action No. 3:04-0489 (S.D.W.V. May 26, 2005). Using the hourly rate of $1,470.09/hr. as a benchmark, SB&C's attorney fee would need to exceed $6.2 million before the "clearly excessive" issue should be considered.[26]

E. THE CIRCUIT COURT PROPERLY FOUND THAT SB&C BORE MUCH RISK IN THE GARNER WILLIAMS LITIGATION AND THAT A VERY REAL CHANCE EXISTED THAT IT WOULD NEVER COLLECT A FEE.

On or about August 31, 1995, Laxare filed for bankruptcy during the pendency of the Garner Williams litigation. ***Bates stamped document 104***. On August 20, 1996, the Bankruptcy Court entered an Order authorizing and permitting Laxare to assume and continue the lease dated July 1, 1968. ***Bates stamped document 116***. Before it could do so, however, Laxare had to provide adequate protection to Ms. Marks and Ms. Luther if the Court later found that Ms. Marks and Ms. Luther were not bound by

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24 The Restatement (Third) of the Law Governing Lawyers provides that "[a] contingent fee may permissibly be greater than what an hourly fee lawyer of similar qualifications would receive for the same representation. A contingent-fee lawyers bears the risk of receiving no pay if the client loses and is entitled to a compensation for bearing that risk." Restatement (Third) of the Law Governing Lawyers §35 cmt. c (1998).

25 It is also important to note that the thirty percent contingency fee percentage is also reasonable as a matter of law. Calculating an attorney fee for the $3.5 million settlement using the more widely used and accepted percentages of 33.3% and 40% would have produced additional attorneys' fees of $116,666.67 and $350,000.00 respectively.

26 In *Abramson*, the lawyers had only "contributed 146.25 hours of work in the course of its six-month representation of the plaintiff." Nevertheless, the United States District Court for the Southern District of West Virginia awarded a ten percent (10%) contingency fee producing an average hourly rate of $1,470.09/hr.

In the present matter, SB&C has contributed approximately 4,214.80 lawyer hours and 971.90 paralegal hours on issues related to the Garner Williams litigation (including the Lease and side letter agreement). Therefore, an hourly rate for lawyers in excess of $1,470.09/hr. can be considered reasonable given the amount of time SB&C expended and risk SB&C bore.

the lease dated July 1, 1968. ***Bates stamped documents 117-119***. To effectuate that end, Laxare agreed to deposit into an escrow account amounts representing current fair market value for royalties and other fees, i.e., amounts over and above the royalties and fees set forth in the lease dated July 1, 1968, pending a final determination as to whether or not Ms. Marks and Ms. Luther were bound by the lease dated July 1, 1968. ***Bates stamped document 13***.

At this stage in the Garner Williams litigation, it became clear that Ms. Marks and Ms. Luther would be bound either under the lease dated July 1, 1968 or under a new lease to be approved and sanctioned by the Bankruptcy Court. However, even though the Bankruptcy Court remanded Ms. Marks' and Ms. Luther's damage claims against Laxare back to the Circuit Court of Kanawha County, it also became clear that any damages assessed against Laxare would be either discharged in bankruptcy or subject to the jurisdiction of the Bankruptcy Court. Therefore, the Bankruptcy Court strongly urged the parties to settle their differences because the real possibility existed that Ms. Marks and Ms. Luther would recover nothing from Laxare. ***Bates stamped documents 113 and 115.***

Reaching a settlement was difficult, however, because Laxare and Cannelton strongly resisted Ms. Marks' and Ms. Luther's damage claims against them, primarily on the basis of laches and/or estoppel.[27] For example, Laxare began leasing the Boone County mineral property in 1966 which lease was later replaced by the lease dated July 1, 1968. Laxare subleased the property to Cannelton in 1974.

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[27] A summary of Cannelton's and Laxare's laches and estoppel defenses are contained in their respective Petitions for Appeal filed with the West Virginia Supreme Court of Appeals on July 23, 1997 (No. 971688) and July 24, 1997 (No. 971689) after the Bankruptcy Court remanded a portion of the Garner Williams litigation back to the Circuit Court of Kanawha County. Cannelton and Laxare sought to appeal the Circuit Court of Kanawha County's order dated September 11, 1995, where it granted summary judgment against them, and in favor of Ms. Marks and Ms. Luther, finding that they trespassed with respect to their coal mining activity on the Boone County mineral property and denying them the defenses of laches and estoppel.

As a result of these leases and subleases, Laxare and/or Cannelton actively and openly mined the Boone County mineral property beginning as early as 1974. Moreover, Cannelton actively and openly constructed a multi-million dollar preparation plant on the Boone County mineral property in the 1970's. Furthermore, beginning in 1968 and continuing through the filing of the Garner Williams litigation in 1988, Laxare paid to Ms. Marks and Ms. Luther (through Ms. Marks' and Ms. Luther's brothers) a portion of the royalty and other fees under the lease dated July 1, 1968.

For these reasons, Laxare and Cannelton argued that the doctrines of laches and/or estoppel barred Ms. Marks' and Ms. Luther's damage claims against them, and that Ms. Marks and Ms. Luther should instead pursue damage claims against their brothers because the brothers failed to pay them their proportionate share of the royalties and fees under the lease dated July 1, 1968. In addition, Laxare and Cannelton argued that the brothers gave them written assurances that Ms. Marks and Ms. Luther consented to the 1968 lease arrangements with Laxare and Cannelton.[28]

Reaching a settlement was also made difficult because, in 1994, Cannelton abandoned its 1974 sublease with Laxare and terminated all mining at the Boone County mineral property. ***Bates stamped document 82***. As a result, Laxare pursued a damage claim against Cannelton in the Garner Williams litigation alleging premature termination of the 1974 sublease.

The confluence of these facts plus the Bankruptcy Court's strong urging that the parties try to settle their differences caused the parties in the Garner Williams litigation to begin discussing settlement

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[28] SB&C time records reflect that it spent over 50 hours researching laches and estoppel issues in the Garner Williams litigation. ***Bates stamped documents 71, 75, 80, 82, 83, 84, 85, 94, and 95***.

in earnest. Ms. Marks and Ms. Luther recognized that if Laxare and Cannelton successfully argued their laches and/or estoppel defenses, then the real possibility existed that Ms. Marks and Ms. Luther would recover nothing from Laxare and Cannelton, and that they could only recover from their brothers who had no meaningful assets.

In exchange for Laxare and Cannelton abandoning their defenses of laches and/or estoppel and agreeing that the lease dated July 1, 1968 did not bind Ms. Marks and Ms. Luther, Ms. Marks and Ms. Luther agreed to accept a lump sum payment of $3.5 million plus the execution of a new Lease and side letter agreement beneficial to Ms. Marks and Ms. Luther. The new Lease and side letter agreement paid to Ms. Marks and Ms. Luther increased amounts over and above the lease dated July 1, 1968, and these increased amounts helped Ms. Marks and Ms. Luther recoup their past damages.[29] It is worth repeating again that the two brothers (and their families) of Ms. Marks and Ms. Luther are still bound by the less beneficial lease dated July 1, 1968.

Ms. Marks and Ms. Luther agreed to abandon their original claims against Laxare and Cannelton for $15-50 million dollars in damages (possibly $59 million to in excess of $200 million in damages depending upon a finding of intentional trespass and treble damages) and, instead, accept a lump sum payment of $3.5 million plus the execution of a new Lease and side letter agreement beneficial to Ms. Marks and Ms. Luther because they recognized that Laxare was in bankruptcy and/or could go out of

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The Appellants contend that "the new lease and side letter agreement are at market rate and include no payment for past damages." Appellants' brief at 5. The Appellants miss the issue entirely. The issues is not whether or not the new Lease and side letter agreement are at market rate. In fact, SB&C is not likely to dispute that issue. Instead, the relevant issue is whether or not SB&C successfully removed Ms. Marks and Ms. Luther from the less favorable terms of the lease dated July 1, 1968 and placed them into the more favorable terms of the new Lease and side letter agreement. But for SB&C's work in the Garner Williams litigation and the consummation of the subject settlement, the Appellants would still be bound by the less favorable terms (and certainly not market rate) of the lease dated July 1, 1968.

business, that Cannelton could file for bankruptcy and/or go out of business, and that Cannelton terminated all mining at the Boone County mineral property in 1994.[30] In addition, Laxare entered into new leasing arrangements with Boone East Development for all of Laxare's mineral properties, including Prichard property, Lewis property, Rock Creek Colliery property, and the subject Boone County mineral property. The Bankruptcy Court approved and authorized these leasing arrangements with Boone East Development. ***Bates stamped document 161.*** Boone East Development's assumption of the lease dated July 1, 1968, was contingent upon a court finding that the lease dated July 1, 1968 was valid as to all ownership interests in the property and/or Laxare providing adequate protection for Ms. Marks and Ms. Luther if the court later determined that the lease dated July 1, 1968 was invalid as to them. Simply put, Boone East Development was prepared to proceed with or without a new lease with Ms. Marks and Ms. Luther and was authorized to do so by the Bankruptcy Court. The negotiation of the new Lease as part of the settlement gave Ms. Marks and Ms. Luther an opportunity to negotiate its terms as opposed to having the Bankruptcy Court set the terms. However, before being able to negotiate those terms themselves, Ms. Marks and Ms. Luther had to first prevail on the issue of the validity of the lease dated July 1, 1968. As part of the subject settlement and negotiation of the new Lease, Laxare, Cannelton and Boone East Development agreed that Ms. Marks and Ms. Luther were not bound by the lease dated July 1, 1968.

Moreover, at the time of the settlement, there was substantial risk that neither Ms. Marks nor

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30 Ms. Marks' and Ms. Luther's agreement to accept a lump sum payment of $3.5 million plus the execution of a new Lease and side letter agreement beneficial to Ms. Marks and Ms. Luther caused SB&C to no longer be able to possibly collect thirty percent (30%) of $15-50 million dollars in damages (and possibly thirty percent (30%) of $59 million to in excess of $200 million in damages depending upon a finding of intentional trespass and treble damages) under the contingency fee contract.

Ms. Luther would ever receive any amounts under the new Lease and side letter agreement. Because a substantial portion of the coal on the Boone County mineral property had already been deep mined under earlier leases, the remaining coal on the Boone County mineral property is extractable only via mountain top removal and/or other surface mining methods. Due to various court decisions and environmental regulations, mining permits have been difficult–if not impossible–to obtain. Therefore--when the new Lease and side letter agreement were negotiated as part of the settlement--there was a substantial risk that neither Ms. Marks nor Ms. Luther, and thus SB&C, would ever receive any increased amounts under the new Lease and side letter agreement.

F. THE CIRCUIT COURT PROPERLY FAILED TO ADOPT THE OPINIONS OF APPELLANTS' PROFFERED EXPERT WITNESS.

The Circuit Court properly failed to adopt the opinions of Appellants' proffered expert witness, presumably, for two separate and distinct reasons. First, as discussed above, the Appellants' expert witness' opinion is premised on the ***incorrect assumption*** that there was a second, new and separate legal representation where SB&C agreed to negotiate the new Lease and side letter agreement on behalf of Ms. Marks and Ms. Luther. For that reason alone, the Court properly failed to adopt her opinions.[31]

Second, the West Virginia Supreme Court of Appeals has stated that "***courts*** in West Virginia will uphold contingency fee arrangements voluntarily entered into by the parties as long as they are not excessive, overreaching, and do not take inequitable advantage of a client." *Kopelman and Assocs.,*

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31 In fact, Appellants' proffered expert witness ***does not opine*** that the average hourly rates of approximately $260.00/hour for lawyers and $100.00/hour for paralegals are clearly excessive where SB&C spent a grand total of approximately 4,214.80 lawyer hours and 971.90 paralegal hours on issues related to the Garner Williams litigation (including the new Lease and side letter agreement) between 1988 to the present.

L.C. v. Collins, 196 W. Va. 489, 496, 473 S.E.2d 910, 917 n. 7 (1996)(emphasis added). Moreover, the Court has also stated that

> [c]ontracts for contingent fees, generally having a greater potential for overreaching of clients than a fixed-fee contract, ***are closely scrutinized by the courts*** where there is a question as to their reasonableness. This close scrutiny arises from ***the duty of the courts*** to guard against the collection of a clearly excessive fee, thereby fulfilling the primary purpose of attorney-disciplinary proceedings, specifically, protecting the public and maintaining the integrity of the legal profession.

Committee on Legal Ethics v. Tatterson, 177 W. Va. 356, 363, 352 S.E.2d 107, 114 (1986)(citations omitted)(emphasis added). The Court has also held that "[i]t is the province of the Court, and not of the jury, to interpret a written contract." Syl. Pt. 1 of *Stephens v. Bartlett*, 118 W. Va. 421, 191 S.E. 550 (1937). Therefore, the issue of whether or not an attorney fee is "clearly excessive" is a question of law for the Court.

The West Virginia Supreme Court of Appeals has held that expert witnesses cannot give opinions on the law. For example, the Court has held that

> [a]s a general rule, an expert witness may not give his or her opinion on the interpretation of the law as set forth in W. Va. Code, 33-11-4(9)(a)-(o) (2002), which defines unfair claim settlement practices; the legal meaning of terms within that code section; or whether a party committed an unfair claim settlement practice as defined in that code section. Rather, it is the role of the trial judge to instruct the jury on the law.

Syl. Pt. 5, *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 600 S.E.2d 346 (2004). In Jackson, the Court also stated that

> [a]s a general rule, an expert witness may not give his [or her] opinion on a question of domestic law [as opposed to foreign law] or on matters which involve questions of law, and an expert witness cannot instruct the court with respect to the applicable law of the case, or infringe on the judge's role to instruct the jury on the law. So an expert may not testify as to such questions of law as the interpretation of a statute...or case law...or the meaning of terms in a statute...or the legality of conduct.

Jackson at 643. (Quoting 32 C.J.S. Evidence § 634, at 503-04 (1996) (footnotes omitted)).

Accordingly, the opinions of the Appellants' proffered expert witness are neither credible nor relevant because her opinions are based on an incorrect assumption and the issue of whether or not an attorney fee is "clearly excessive" is a question of law for the Court and expert witnesses cannot give opinions on the law.[32]

G. THE CIRCUIT COURT PROPERLY FOUND THAT SB&C'S RECEIPT OF FUTURE ATTORNEYS' FEES IS PERMISSIBLE UNDER THE CONTINGENCY FEE CONTRACT.

The Restatement (Third) of Law Governing Lawyers addresses the issue of contingency fee contracts generally and the application of such contracts to structured settlements specifically. With respect to contingency fee contracts, the Restatement provides that

> (1) A lawyer may contract with a client for a fee the size or payment of which is contingent on the outcome of a matter, unless the contract violates section 34 or another provision of this Restatement....
>
> ****
>
> (2) Unless the contract construed in the circumstances indicates otherwise, when a lawyer has contracted for a contingent fee, the lawyer is entitled to receive the specified fee ***only when and to the extent the client receives payment***.

Restatement (Third) of the Law Governing Lawyers §35 (1988)(Emphasis added). Therefore, as a general matter, the Restatement advocates the exact approach taken by SB&C, Ms. Marks, and Ms. Luther where they agreed that the best way for SB&C to collect its attorney fee under the contingency fee contract with respect to such increased future Lease and side letter agreement amounts would be for it to collect thirty percent (30%) of increased future Lease and side letter agreement amounts if and when Ms. Marks and Ms. Luther actually received such amounts.

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32 Appellants contend that "law experts are allowed to testify as to the reasonableness of another lawyer's conduct. In doing so, a lawyer may very well state her understanding of the legal standard on which she based her opinion." Appellants' Brief at 12. However, Appellants' proffered expert witness is not giving an opinion on a lawyer's standard of care. Rather, Appellants' proffered expert witness is giving an opinion on the legal issue of whether or not an attorney fee is clearly excessive under West Virginia law.

Because the increased amounts that Ms. Marks and Ms. Luther would collect under the Lease and side letter agreement were speculative and difficult--if not impossible--to ascertain and/or quantify and/or reduce to present value at the time of the settlement, Ms. Marks and Ms. Luther both agreed that the best way for SB&C to collect its attorney fee under the contingency fee contract with respect to such increased future Lease and side letter agreement amounts would be for it to collect thirty percent (30%) of increased future Lease and side letter agreement amounts if and when Ms. Marks and Ms. Luther actually received such amounts.[33] Such an arrangement clearly satisfies the approach advocated by the Restatement.

Likewise, the Supreme Court of Minnesota has addressed the issue in the context of structured settlements. *See e.g. Cardenas v. Ramsey County*, 322 N.W.2d 191 (Minn. 1982). In *Cardenas*, the Court held that

> [i]n the absence of an explicit agreement, in writing or entered on the record before the trial court at the time a structured settlement is completed, providing that an attorney shall receive his entire compensation for his services in procuring the settlement from the front money paid thereunder, ***a contingent fee contract which provides that his fees are to be one-third "of the total amount recovered" will be construed to provide that the attorney will receive one-third of each payment received by his client under the settlement as and when he receives it***.

Syl. of *Cardenas* (emphasis added).[34]

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[33] The Understanding is evidenced by SB&C's March 31, 1998, letter to Ms. Marks and Ms. Luther outlining in detail, and confirming, the Understanding. ***Bates stamped documents 11-15 (ATTACHED).***

[34] In its opinion, the Court also stated that "when an attorney and client have entered a contingent fee contract under which the attorney is entitled to a third 'of the total amount recovered' and the attorney thereafter negotiates a structured settlement of the client's claim without reaching an explicit agreement with the client governing the time and manner of payment of his fees, either put into writing or read into the record when the settlement is placed on record before the trial court, then as a matter of law the word 'recovered' in the contingent fee contract must be construed to mean 'received,' with the consequence that the attorney is entitled to one-third of each payment his client receives under the structured settlement as and when he receives it." *Cardenas*, 322 N.W.2d at 193.

Clearly then, the contingency fee contract is also valid, binding, and enforceable against the Appellants notwithstanding the fact that it requires the Appellants to pay thirty percent (30%) of increased future Lease and side letter agreement amounts to SB&C because SB&C's receipt of future attorneys fees is permissible not only under the express terms of the contingency fee contract, but also under the approaches advocated by the Restatement and *Cardenas*.

The Appellants essentially argue that the structured settlement decisions to which SB&C cites to support its attorney fee with respect to the future Lease and side letter agreement amounts are not relevant because "the present value or cost of the structured settlement can be determined and all parties will be aware of the value prior to settlement." However, those decisions–and even the Restatement (Third) of the Law Governing Lawyers to which the Appellants cite–are not premised upon the fact that a structured settlement can be reduced to present value. Instead, those decisions and the Restatement are premised upon the fact that–unless otherwise agreed–a lawyer should not collect an attorney fee until payment is made to the client.

For example, the Official Comment explains that when there is a structured settlement, the lawyer is entitled

> to receive the stated share of each such payment if and when it is made to the client or (when so provided) for client's benefit, unless the client-lawyer contract provides otherwise. When a contingent-fee contract provides that the fee is to be paid at once if there is a structured settlement and provides no other method of calculation, the fee should be calculated only on the present value of the settlement.

Restatement (Third) of the Law Governing Lawyers §35 cmt. e (1998).[35] In the present case, the

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[35] With regard to the application of a contingency fee contract to a structured settlement, the Official Comment provides the following Illustration:

> 4. Lawyer brings a personal-injury suit for Client against Defendant under a fee contract stating

December 20, 1988, contingency fee contract provides that

> [i]n the event that a settlement is effected after the institution of an action or actions, but prior to trial or trials of said action or actions, then and in that event Client agrees to pay said attorneys 30% of the amount collected by any such settlement in each such action.

Bates stamped document 2. Because the December 20, 1988, contingency fee contract did not specifically address structured settlements or similar settlements, SB&C is entitled to receive its fee only if and when the Appellants receive the increased Lease and side letter agreement amounts.

Accordingly, the December 20, 1988, contingency fee contract is valid, binding, and enforceable against the Appellants notwithstanding the fact that it requires the Appellants to pay thirty percent (30%) of increased future Lease and side letter agreement amounts to SB&C because SB&C's receipt of future attorneys fees is permissible not only under the express terms of the contingency fee contract, but also under the approaches advocated by the Restatement and *Cardenas*.

IV.CONCLUSION

SB&C respectfully requests the Court to affirm the entry of judgment because no genuine issue of fact exists and SB&C is entitled to judgment as a matter of law.

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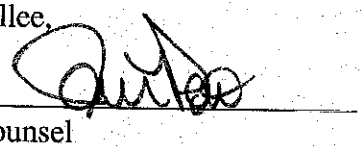
that, if the suit is settled before trial, Lawyer is to receive a fee equaling "thirty percent of the recovery." Client and Defendant enter a structured settlement under which Defendant is to pay Client $100,000 at once and to buy an annuity (which will in fact cost Defendant $200,000) entitling Client to monthly payments of $1,500 until client dies. In the absence of a contrary agreement, lawyer is entitled to receive $30,000 when the $100,000 payment is made and $450 (30% of $1,500) if an when each $1,500 payment is made.

SCHRADER, BYRD & COMPANION, P.L.L.C.
Appellee,



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CERTIFICATE OF SERVICE

Service of the foregoing **APPELLEE'S BRIEF** was had upon the following via hand delivery on November 22, 2006:

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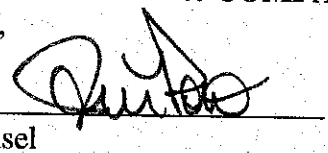
SCHRADER BYRD & COMPANION, P.L.L.C.
Plaintiff,



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